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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION

OREGON FIREARMS FEDERATION, INC., et al., Plaintiffs, v. TINA KOTEK, et al., Defendants.

(Continued)

)
)
) Civil No.
) 2:22-cv-01815-IM
) (Lead Case)
)
) Civil No.
) 3:22-cv-01859-IM
) (Trailing Case)
)
) Civil No.
) 3:22-cv-01862-IM
) (Trailing Case)
)
) Civil No.
) 3:22-cv-01869-IM
) (Trailing Case)
)

* VIDEOCONFERENCE *

DEPOSITION UPON ORAL EXAMINATION

OF EXPERT

DENNIS E. BARON

Witness located in:

Champaign, Illinois

* All participants appeared via videoconference *

DATE TAKEN: March 30, 2023
REPORTED BY: Tia B. Reidt, Washington RPR, CCR #2798
Oregon # 22-0001

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1 _____
2 (continued))
3)
4 MARK FITZ, et al.,)
5)
6 Plaintiffs,)
7 v.)
8)
9 ELLEN F. ROSENBLUM, et al.,)
10)
11 Defendants.)
12)
13 _____
14)
15 KATERINA B. EYRE, et al.,)
16)
17 Plaintiffs,)
18)
19 v.)
20)
21 ELLEN F. ROSENBLUM, et al.,)
22)
23 Defendants.)
24)
25 _____

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1 THE COURT REPORTER: Exhibit 25 has been marked.

2 BY MR. GALLAGHER:

3 Q. Professor, in your declaration in this case,
4 paragraphs 2 and 3, you state "I have evaluated the
5 historical use of the terms 'arms' and 'accoutrement' in
6 order to determine whether ammunition or ammunition storage
7 containers were considered arms in the time during and just
8 after the Founding Era (1750-1820) through the
9 Reconstruction Era, i.e., the period
10 following the ratification of the Fourteenth Amendment
11 (1868-1890). The purpose of this inquiry is to examine
12 whether modern firearm magazines (including large-capacity
13 magazines), which are ammunition containers, should be
14 considered 'arms' within the original public meaning of the
15 Second Amendment's text. Based on my research, they should
16 not.

17 The lexical evidence leads me to conclude that
18 ammunition and ammunition storage containers were considered
19 accoutrements and not arms during the Founding and
20 Reconstruction Eras."

21 Are those the opinions you plan to testify about
22 at trial?

23 A. Yes.

24 Q. Are there any other opinions you plan to testify
25 to at trial?

Page 23

1 A. I believe Zach reviewed it.

2 Q. Your declaration says that, quote, "cartridge
3 boxes," unquote, are, quote, "analogs to modern firearms
4 magazines," unquote. That's in paragraph 26.

5 What is a cartridge box?

6 A. A cartridge box, sometimes called a cartouche
7 box -- "cartridge" and "cartouche" seemed to be used
8 synonymously at the period. Sometimes "cartridge case."
9 They were ammunition holders.

10 Q. Could you expand a little bit more on what you
11 mean by "ammunition holders"?

12 A. They were containers in which, in most of the
13 contexts that I found in the data, soldiers kept their
14 bullets.

15 Q. And what do you understand bullets at the time to
16 consist of?

17 A. In many cases, I did not find that defined in the
18 data. Not being a weapons expert, I really can't comment on
19 the nature of those bullets.

20 Q. How did you arrive at your definition of
21 "cartridge box"?

22 A. I started with a dictionary.

23 Q. And did you refine it from there?

24 A. Looking at the Corpus data, I came across
25 references to what they tended to be made of. In some

Page 25

1 Q. So the Supreme Court in Bruen said, quote, "All
2 analogical reasoning requires a determination of whether the
3 two things are relevantly similar," unquote. "And because,"
4 quote, "everything is similar in infinite ways to everything
5 else, one needs some metric enabling the analogizer to
6 assess which similarities are important and which are not.
7 For instance, a green truck and a green hat are relevantly
8 similar if one's metric is things that are green. They are
9 not relevantly similar if the applicable metric is things
10 you can wear," unquote.

11 Would you agree with this definition of
12 "analogical reasoning"?

13 A. I don't have any objections. I don't know how
14 exhaustive it is, but it seems like a good place to start.

15 Q. Is there anything you would like to add to it for
16 the purposes that we're discussing analogs in this case?

17 A. No.

18 Q. How did you select "cartridge box" as your analog
19 for "modern firearms magazines" as a process?

20 Let me rephrase.

21 In terms of your procedure, how did you select
22 "cartridge box" as your analog for "firearms magazines"?

23 A. You know, I'm not entirely sure.

24 Q. Did you consult --

25 A. It happened several months ago when I first made

Page 26

1 the connection, and I don't remember exactly how it
2 happened.

3 Q. Did you consult with one of the other experts in
4 making this conclusion?

5 A. No.

6 Q. Did you consult any written sources in making this
7 conclusion?

8 A. I believe it came through some of the reading I
9 was doing about magazines.

10 Q. Did you talk with any firearms engineers or
11 firearms historians before deciding that "cartridge box" was
12 the analog you would use for "magazine"?

13 A. No.

14 Q. Why didn't you consult any of these sources?

15 A. I didn't know anybody to consult.

16 Q. Did you consider using any other part of an
17 18th-century firearm or equipment as your analog?

18 A. No. I believe I was fairly focused on looking for
19 something that had a similar function to a modern magazine.

20 Q. Would you agree there have been a lot of changes
21 in firearms technology since the 18th century?

22 A. From what I understand, yes.

23 Q. Given that, what made you certain there was a
24 proper analog at all?

25 A. Because of the functional similarity. Both hold

Page 27

1 ammunition.

2 Q. Professor, what is your understanding of how
3 modern firearms magazines work when used with a
4 semi-automatic weapon?

5 A. Only what I read in the Washington Post. I have
6 no -- I have no -- I have no hands-on knowledge. I haven't
7 even looked at diagrams or --

8 Q. So could you explain to the best of your ability
9 how a modern firearms magazine works?

10 A. Again, from an article in the Washington Post just
11 the other day, which I think is the first time I actually
12 read something about how modern firearms magazines work,
13 they are apparently now made of hard plastic and contain
14 bullets that are moved into the firing chamber using a
15 spring.

16 But, again, this was a total layperson's
17 understanding. I've got no linguistic expertise to add to
18 that and certainly no firearms background to add to that.
19 It's like I'm giving you a book report of what I read the
20 other day.

21 Q. How were the bullets moved from the cartridge box
22 into an 18th-century musket?

23 A. From a couple descriptions that were in the data,
24 the user removed the bullet from the cartridge box and
25 placed it in the firearm. And different firearms had

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1 different ways of doing that from what I understand from the
2 data.

3 Q. Were the 18th-century cartridge boxes attached to
4 the firearm?

5 A. I believe they were not.

6 Q. Are you aware of how many steps it took to reload
7 a standard musket from the period, say, the Brown Bess?

8 A. Not specifically, but I believe it was not a
9 simple process.

10 Q. Would, depending on count, a figure of like 15 or
11 26 different steps sound reasonable to you?

12 MR. PEKELIS: Object to form.

13 THE WITNESS: I have no way of knowing how many
14 steps. A few steps is what I would say, but I have no way
15 of knowing that. You would have to ask a Civil War
16 reenactor or something like that.

17 BY MR. GALLAGHER:

18 Q. I'm glad you bring that up because that brings me
19 to Exhibit 29, which is the Manual for Safe Use of
20 Reproduction Flintlock Weapons in Historic Weapons
21 Demonstrations.

22 (Exhibit 29 marked for identification.)

23 THE COURT REPORTER: Exhibit 29 has been marked.

24 BY MR. GALLAGHER:

25 Q. Sir, can you see that either on your end or my

Page 29

1 end?

2 A. Yeah, I can see it on your end now. I was looking
3 at it on my end.

4 Q. This is the list of required motions for firing an
5 18th-century flintlock. Would you agree this is quite a
6 number of steps?

7 A. Appears to be, yes.

8 Q. And would you say it's more than ten?

9 A. Yes.

10 Q. Well, hold on. I may keep sharing it just for the
11 time being.

12 Do you know how long the reloading process took
13 or, put another way, how many rounds per minute a
14 well-trained user could fire?

15 A. No idea.

16 Q. Do you know how many steps it takes for a
17 semi-automatic firearm to reload from a modern magazine?

18 A. I do not.

19 Q. These are the parts of a Brown Bess musket.

20 Do you see that?

21 A. Yes.

22 Q. Are you familiar with what a ramrod was?

23 A. Sort of.

24 Q. Did you consider using the ramrod instead of the
25 cartridge box as your analog for a magazine in light of the

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1 spring that is within the magazine?

2 A. I did not.

3 Q. If you did consider it, how would you say that it
4 compares as an analog to the cartridge box?

5 A. I'm not prepared to answer. I don't know.

6 Q. I'll move to a related topic.

7 In Paragraph 10 of your -- of your declaration,
8 you wrote that "arms does not include flints," end quote.
9 And, quote, "Nor does arms refer to parts of the weapon, for
10 example, the trigger of a gun, the hilt of a sword," end
11 quote.

12 Is it still your opinion today that a trigger is
13 not an arm?

14 A. I guess so.

15 Q. Professor, could you please describe to the best
16 of your ability what parts of an 18th-century musket such as
17 this one is necessary for the firearm to actually fire as
18 designed?

19 A. I could not do that, no.

20 Q. Would you agree that the barrel is necessary for
21 the gun to fire as designed?

22 A. The barrel, did you say?

23 Q. Yes.

24 A. It's a part versus whole question, isn't it?

25 Q. I agree it's a part versus whole question. Let me

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1 mechanism as you see here versus if it were kept loose, say,
2 in the soldier's pocket?

3 A. I really don't feel qualified to make those kinds
4 of --

5 Q. Okay.

6 Let me -- let me ask a related question.

7 A. These are things you need to get firearms people
8 to testify. I'm just looking at a whole bunch of lists, and
9 if something appears on the list separately from the
10 firearm, that's what I understand it, it's something
11 separate. And how you put all those things together -- I
12 mean, I saw the lists, and reading that list would not give
13 me enough understanding of how to work the gun.

14 Q. I understand that. And I'm trying to ask a
15 linguistic question with --

16 A. Okay.

17 (Speaking simultaneously. Unreportable
18 crosstalk.)

19 Q. -- so maybe I should just rephrase it.

20 Take a firearm -- take an armory shop, I guess
21 might be the right term, in which there are many barrels but
22 they're not in guns.

23 A. Correct.

24 Q. Speaking of the barrel --

25 A. Right. Okay.

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1 Q. Would you agree there was significant changes in
2 firearms technology after the Founding period?

3 A. So I understand. Again, not an expert.

4 Q. To the best of your ability and knowledge, can you
5 briefly describe what those changes were.

6 A. I don't feel qualified to do that except in the
7 broadest of terms that I know revolving pistols get
8 introduced somewhere around the mid-19th century, and what
9 we would call machine guns or, I suppose, automatic get
10 introduced around that time, around the Civil War time as
11 well.

12 But, again, this comes from watching cowboy movies
13 as a kid and vague recollections of things I've read in
14 newspaper accounts today reflecting on the history of
15 firearms. I am no historian of these things. I only track
16 the words and the data.

17 Q. Just to drill down a little bit on the machine gun
18 point that you just made. When you say "machine gun," do
19 you mean a fully automatic --

20 A. I think so. I think so. Well, I don't know how
21 automatic they were, okay?

22 Q. Do you know what an automatic firearm -- what the
23 automatic firearm mechanism is? Or how would you define an
24 automatic firearm in the technical sense?

25 A. Just a layperson's understanding of it, from what

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1 I gather -- and I'm not giving an expert opinion here --
2 that the automatic weapon is one where you can fire multiple
3 bullets with one pull of the trigger whereas a
4 semi-automatic requires multiple trigger pulls.

5 Does that sound right?

6 Q. And can you distinguish a repeating rifle from
7 those two terms, so just function?

8 A. No.

9 Q. Do you know what a repeating rifle is?

10 A. I have heard the term. I don't know what it is.
11 I'm sure it's one or the other. Or not. It could be a
12 third thing.

13 Q. And last question on this just to inform our
14 linguistic --

15 A. You like to expose my ignorance to the Court, I
16 know.

17 Q. I swear we're going somewhere with all of this.

18 Can you discuss the -- any understanding you have
19 of the changes in ammunition from the Founding period to the
20 time of the Civil War?

21 A. I believe -- and again, this is just nonexpert
22 opinion -- they learned how to combine the gunpowder and the
23 bullet together.

24 MR. GALLAGHER: I am now going to display
25 Exhibit 35.

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1 (Exhibit 35 marked for identification.)

2 THE COURT REPORTER: Exhibit 35 has been marked.

3 BY MR. GALLAGHER:

4 Q. Professor, can you describe what type of document
5 this appears to be?

6 A. It's a patent for the C.N. Springer [sic] magazine
7 gun dated 1860.

8 Q. Take a look at the inventor's name again.

9 A. C.N Spencer.

10 Q. Spencer, yes.

11 A. Yes.

12 Q. And do you see the patent number there? It's also
13 highlighted on the first page.

14 A. Yeah, 27,393.

15 Q. And can you read the description on the first
16 page with text in it that's highlighted beginning
17 "Figure 1."

18 A. "Figure 1 is a longitudinal sectional view of the
19 breech and parts of the stock, magazine, and barrel of a gun
20 with my improvement, exhibiting it in condition for firing."

21 Q. And can you see the magazine in the picture on the
22 first page?

23 A. I would not be able to identify which part is the
24 magazine. I assume it's where your cursor is, but --

25 Q. Can you see any bullets in this illustration?

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1 A. I -- I don't see -- I'm looking. I don't see
2 anything that looks like a bullet, but am I missing
3 something here?

4 Q. Do those appear to be bullets beneath the letter
5 "K"?

6 A. I'm sorry.

7 Q. Do those appear to be bullets beneath the part
8 that is labeled with the letter "K"?

9 A. Oh, yeah.

10 Q. And the part that's labeled "I," which I now see
11 as well?

12 A. I'm looking for "I."

13 Q. Behind that first -- behind the last bullet, I
14 think.

15 A. Oh, oh, okay. It looks like two bullets; is that
16 right?

17 Q. Yes.

18 Okay. I'm going to display a couple exhibits,
19 and then we'll discuss them collectively.

20 A. Okay.

21 MR. GALLAGHER: So this will be Exhibit 36.

22 (Exhibit 36 marked for identification.)

23 THE COURT REPORTER: Exhibit 36 has been marked.

24 BY MR. GALLAGHER:

25 Q. Professor, if you can see it on my screen or

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1 yours --

2 A. Yeah, I see it on your screen. Okay. I see --
3 now I can see bullets, now that you showed me what they
4 looked like.

5 Q. And can you describe for the record what this
6 exhibit is.

7 A. This is the patent office record for improvement
8 in magazine firearms number 30,446 by someone named B.T.
9 Henry, patented in 1860. So the same year as the last one.

10 Q. And can you please read the sentence beginning
11 "Figure 6" on the bottom left of the first page with text on
12 it.

13 A. "Figure 6 gives a perspective view of the carrier,
14 Block C, showing the Chamber, 3, in which the ammunition is
15 received from the magazine and carried up to the breech of
16 the gun."

17 BY MR. GALLAGHER:

18 Q. Thank you.

19 MR. GALLAGHER: We'll now turn to Exhibit 37,
20 which I'm bringing up.

21 (Exhibit 37 marked for identification.)

22 THE COURT REPORTER: Exhibit 37 has been marked.

23 BY MR. GALLAGHER:

24 Q. Is it easier for you, Professor, to see if I keep
25 these on single-page view instead of double? I'm working

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1 with some big screens here.

2 A. No. No. No.

3 Q. Okay.

4 Please could you describe what this exhibit
5 appears to be.

6 A. Okay. It's another patent dated 1866, Patent
7 No. 55,012 in the name of N. King for a magazine firearm.

8 Q. And do you see anywhere on the second page where
9 there was --

10 A. MY --

11 (Speaking simultaneously. Unreportable
12 crosstalk.)

13 (Reporter clarification.)

14 BY MR. GALLAGHER:

15 Q. -- an assignor.

16 A. Where there was what?

17 Q. An assignor.

18 Can you read the second line from the very top of
19 the page, the sub-headline.

20 A. Oh, oh, "Assignor to O.F. Winchester."

21 Oh, so this is the famous Winchester.

22 Q. Yes, part of it. We'll get to the other part.

23 A. Okay.

24 Q. Can you read the highlighted section: "My
25 invention relates" --

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1 A. "My" -- "My invention" --

2 (Speaking simultaneously. Unreportable
3 crosstalk.)

4 (Reporter clarification.)

5 BY MR. GALLAGHER:

6 Q. That's my fault also.

7 Can you please read from "My invention," where
8 it's highlighted on the second page.

9 A. "My invention relates to an improvement in the
10 repeating firearms patented by Horace Smith and Daniel B.
11 Wesson, the 14th of February, 1854, improved by B.T. Henry,
12 patented October 16th, 1860, in which several metallic
13 cartridges are placed in a tube or magazine beneath the
14 barrel of the arm and carried therefrom to the barrel of the
15 movement of the trigger guard."

16 Do you want me --

17 Q. No, that is -- that is fine.

18 Actually, yes. Could you continue reading "And
19 my..."

20 A. "And my invention consists of an improvement in
21 the said arm whereby the cartridges may be placed in the
22 magazine with greater facility and without other objections
23 which exist to the tube as heretofore constructed."

24 Q. Great.

25 And one last patent.

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1 MR. GALLAGHER: This is Exhibit 38.

2 (Exhibit 38 marked for identification.)

3 THE COURT REPORTER: Exhibit 38 has been marked.

4 BY MR. GALLAGHER:

5 Q. Please could you describe this exhibit, sir?

6 A. A patent by O.F. Winchester of New Haven,

7 Improvement in Magazine Firearms, patent number 57,808,

8 dated 1866, for a magazine firearm.

9 Q. And could you please read the highlighted section,
10 Figure 8.

11 A. "Figure 8 illustrates the manner of filling the
12 magazine with cartridges."

13 Q. So looking at these -- well, let me stop there
14 and --

15 Sorry. Let me start with a different question.

16 You said earlier "the famous Winchester."

17 Do you -- could you expand by what you mean by the
18 famous Winchester?

19 A. Just from having watched cowboy movies as a kid,
20 the Winchester rifle. I knew nothing about it other than
21 the name.

22 Q. And do you now understand that the Winchester
23 rifle had a magazine?

24 A. Yes.

25 Q. And that the magazine was inside the construction

Page 55

1 of the rifle itself?

2 A. Yes.

3 Q. It could not be removed without disassembling the
4 rifle?

5 A. Apparently not.

6 Q. Would you agree that the dates on -- well, would
7 you agree that the same is true of the Henry and Spencer
8 rifles based on the patents that you just reviewed?

9 A. It seems to be the case, yes.

10 Q. Do you know anything about the Henry or Spencer
11 rifles?

12 A. No.

13 Q. And you would agree that the dates on all four of
14 these patents were before the ratification of the Fourteenth
15 Amendment; correct?

16 A. Right. Which was what, 1868?

17 Q. Yes.

18 A. Yeah.

19 MR. GALLAGHER: I am going to display one more
20 exhibit. Let me find it here. Exhibit 32.

21 This is from the third page of the New York Times
22 on Friday, December 23rd, 1864, offered as Exhibit 32.

23 (Exhibit 32 marked for identification.)

24 THE COURT REPORTER: Exhibit 32 has been marked.

25 ///

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1 BY MR. GALLAGHER:

2 Q. Let's get this down to a more manageable size.

3 A. Yeah.

4 Q. Does that work for you, Professor?

5 A. That's better.

6 Q. Could you read the highlighted portions of this --
7 it's a paragraph, but I think it's also one sentence.

8 A. Yeah.

9 "An ordnance examining board. By special order of
10 the War Department, a board of the officers will convene at
11 the Springfield armory on the 4th of January, 1865, for the
12 purpose of examining, testing and recommending for adoption
13 a suitable breech loader for muskets and carbines and
14 repeater or magazine carbine."

15 Q. Would you agree that the phrase "repeater or
16 magazine carbine" indicates that repeater rifles or carbines
17 were considered synonymous with those that used magazines,
18 at least as is used in this sentence?

19 MR. PEKELIS: Object to form.

20 THE WITNESS: They seem to be synonymous.

21 BY MR. GALLAGHER:

22 Q. So taking --

23 A. Sorry. This is one that did not come up in my
24 newspaper searches, which is curious, because they did cover
25 the Times.

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1 Q. Did you run the phrase "magazine" through the New
2 York Times Times Machine archive?

3 A. No. I used newspapers.com, which also covers the
4 Times. It's a little easier to use.

5 Q. So stepping back from this specific document to
6 consider the four patents and the article as a whole, what
7 would this tell you about the use of the word "magazine" by
8 this period?

9 A. That -- what it would tell me is that people
10 involved in the manufacture of military firearms were
11 familiar with the term "magazine" in relation to what we
12 would loosely call the part that holds the bullets.

13 Q. Earlier, you said that when a term isn't explained
14 in a source, it often indicates familiarity with that term.
15 Is that correct?

16 A. Yes.

17 Q. And in the New York Times article we just looked
18 at, is the phrase "magazine" explained?

19 A. Only -- in my view, only insofar as it's listed as
20 a synonym for "repeater."

21 Q. And does that indicate --

22 A. Repeater --

23 (Speaking simultaneously. Unreportable
24 crosstalk.)

25 THE WITNESS: Sorry.

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1 (Reporter clarification.)

2 BY MR. GALLAGHER:

3 Q. No. Professor, if you had anything else --

A. No. No. Ask your question.

5 Q. So it's only explained insofar as it indicates
6 that it's a synonym for "repeater." Does that indicate that
7 the term "repeater" and/or "magazine" would be understood by
8 the readership of the New York Times because there's not a,
9 as you said, an explanation given of those two terms beyond
10 one another?

A. It would suggest that, yeah.

12 Q. And the readership of the New York Times is the
13 general public, more or less?

14 A. More or less.

Q. Finally, whether or not they knew of the term --

A. Can I -- can I modify that statement?

17 Q. Sure.

A. In -- what is the date of this article?

19 Q. 1864.

20 A. Okay.

21 | So the

22 O. '52,

A. '52. '52. Okay. I knew -- I knew it was aro

24 | there.

25 The readership of the Times early on was -- I'm

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1 not sure it would be fair to characterize it as a national
2 newspaper at the time. We would think of it that way today,
3 but I think certainly, readers of the Times would be
4 expected to understand.

5 Q. Can you think of why this ordnance examining board
6 might have been page 3 news in the New York Times in 1864?

7 A. I can't say that, no.

8 Q. Would examining the rest of this article -- and
9 I'm happy to give you a second -- indicate why? It's not a
10 trick question.

11 A. It might help.

12 Q. Okay.

13 Take a second and --

14 A. (Speaking simultaneously.)

15 (Reporter asks parties to speak one at a time.)

16 BY MR. GALLAGHER:

17 Q. -- feel free to look the article over.

18 A. News from Washington.

19 Q. Maybe I can put it another way.

20 Was there anything going on in 1864 that would
21 cause the general public to be interested in developments in
22 military technology more so than usual?

23 A. Well, it was the Civil War period.

24 Q. Putting aside the linguistic term "magazine" for a
25 second, I assume you would agree that the users of the

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1 A. According to the patent that you showed me.

2 Q. And they were called magazines. The term was
3 called -- the term by which that component of the gun was
4 referred to was "magazine" at the time, yes?

5 A. In the patent, yeah.

6 Q. And in the newspaper coverage at least that we've
7 seen.

8 A. In the one article in the Times, yeah.

9 Q. Did you do any -- hold on. I'll stop sharing
10 this.

11 Did you do any research to see if any magazines,
12 once they came into common use, were referred to as
13 accoutrement?

14 A. No.

15 Q. And the items that you have seen that were
16 referred to as accoutrement were items that were outside of
17 or separate from the gun itself; correct?

18 A. Well, I suppose, although if you're -- you had
19 suggested that things like the ramrods and the flints were
20 internal.

21 Q. I think we had -- based on your testimony, we had
22 agreed there was a distinction between a part when it was
23 outside the whole and a part as part of the whole.

24 A. Okay.

25 Q. But I guess for completeness' sake, even -- even

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1 speaking of a barrel, did you see anything to suggest that,
2 like, a barrel would be referred as an accoutrement as
3 opposed to a gun part?

4 A. I can't say offhand, but...

5 Q. Let me direct your attention to your declaration,
6 paragraph 33, subparagraph (l).

7 A. 33(l).

8 Okay.

9 Q. And I'll just ask you to take a minute to look
10 will you (l) through (r), which are the examples -- excuse
11 me. That should have been (k) through (r).

12 A. Okay.

13 Q. The examples that were proffered in the
14 Reconstruction period.

15 A. Okay.

16 Q. Is it accurate to say that your Reconstruction-Era
17 examples refer to the standard old-fashioned cartridge
18 boxes, boxes for carrying cartridges to be manually loaded
19 into rifles, rather than to magazines of the sort that were
20 internal to the gun as we have seen in the Winchester?

21 MR. PEKELIS: Tia, could you read back the
22 question for me?

23 (Reporter clarification.)

24 BY MR. GALLAGHER:

25 Q. Is it accurate to say that your examples from the

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1 Reconstruction Era given here in paragraph 33(k) through (r)
2 refer to standard old-fashioned cartridge boxes, which is to
3 say boxes for carrying cartridges to be loaded manually into
4 rifles, rather than to magazines of the sort that we saw
5 were internal to repeating rifles?

6 A. They seem to be, yes.

7 Q. And directing your attention specifically to
8 33(m), that's a little different, isn't it?

9 A. Okay.

10 Yeah.

11 Q. Do you know what the Mitrailleuse was?

12 A. I know what it sounds like, which is more of a
13 machine gun or -- but they refer to it as a cannon as well.
14 So in terms of size or anything like that, I could not
15 comment. I'm just guessing from the context.

16 Q. The entire cartridge box, what they're referring
17 to as a cartridge box, appears to be put into this cannon or
18 artillery piece at once and fired and then removed; is
19 that -- is that correct?

20 A. That's my understanding, yeah.

21 Q. And that's a bit different from the other
22 cartridge boxes in paragraph 33(k), (l), and then (n)
23 through (r); right?

24 A. Right.

25 So what is the -- the implication is that whoever

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1 reporter writing this story was using a term they were
2 familiar with, "cartridge box." Why did they not pick
3 "magazine"? Was it not in their sort of reporter's
4 vocabulary? It's an interesting question.

5 Q. Did you make any effort to disaggregate the use of
6 old-fashioned cartridge boxes and either new magazines or
7 feeding devices of any new sort in your study of the
8 Reconstruction period sources?

9 A. Not as such, no.

10 Q. So turning to a slightly broader topic, Professor,
11 in your declaration, you say you studied the uses of the
12 words "cartridge boxes" or "cartouche boxes" or other
13 synonyms and the word "accoutrement."

14 Did you study for this declaration instances in
15 which arms were mentioned but cartridge boxes or
16 accoutrement were not mentioned? In other words, when
17 "arms" was used as a term on its own absent the term
18 "cartridge box" or "accoutrement"?

19 A. Not specifically, no, because there were too many
20 examples to -- given the time frame.

21 Q. So --

22 Please continue.

23 A. No. That's it.

24 Q. If we look at paragraph 49 of your declaration, it
25 begins "There are over 47,000 citations in newspapers.com

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1 for 'arms' or 'accoutrement' in the period 1868 to 1900 and
2 15,799 citations for the exact phrase" --

3 (Reporter requests to please read slowly when
4 reading.)

5 MR. GALLAGHER: Sorry. I'm a Philadelphian, and
6 I'm trying to be slow, but I'm maybe not good at it.

7 THE WITNESS: Which paragraph are you on?

8 MR. GALLAGHER: 49.

9 THE WITNESS: 49. Got it.

10 BY MR. GALLAGHER:

11 Q. Could you read the opening -- could you read the
12 opening sentence in paragraph 49.

13 A. Yeah. "There are over 47,000 citations in
14 newspapers.com for 'arms' or 'accoutrement'
15 in the period 1868-1900, and 15,799 citations for the exact
16 phrase 'arms and accoutrements.'"

17 Q. So I -- at the risk of doing math, I assume the
18 difference between the 47,000 figure for "arms" or
19 "accoutrements" and the about 16,000 figure for "arms and
20 accoutrement" means that there were several thousand
21 instances at a minimum of results for "arms" alone?

22 A. Right. That's a fair guess.

23 Q. Did you analyze the several thousand instances of
24 the use of "arms" on its own to see if they, in context,
25 covered ammunition and accoutrement also?

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1 A. No.

2 Q. Why not?

3 A. Too many.

4 Q. Okay.

5 A. Short time turnaround.

6 Q. I would like to -- yeah.

7 MR. GALLAGHER: I would like to share what will be
8 Exhibit 33. It's a copy of the Declaration of Independence.

9 (Exhibit 33 marked for identification.)

10 THE COURT REPORTER: Exhibit 33 has been marked.

11 BY MR. GALLAGHER:

12 Q. Professor, if you can turn to page 3 of this
13 document. I'm not sure the Declaration itself had
14 pagination, but on this document, page 3 and read the
15 highlighted clause, please.

16 A. Yes. "He has" --

17 You want me to read it?

18 Q. Yes, please.

19 A. "He has constrained our fellow citizens taken
20 captive on the high seas to bear arms against their
21 country," "he" being King George.

22 Q. Yes.

23 Is it your position that the text implies that
24 these impressed sailors had arms but not ammunition?

25 A. It is my interpretation of that sentence that

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1 "bear arms" is used in its idiomatic sense to mean "fight
2 against" in general.

3 Q. And since these are -- sorry. Please continue.

4 A. However, that fight is to be construed, does not
5 specify.

6 Q. And since they're on the high seas, do you
7 understand that we're talking about impressment?

8 A. Yes.

9 Q. And do you know what impressment is?

10 A. Roughly, it is when -- when one power captures
11 another power's ship on the high seas and forces the crew to
12 fight against their country of origin.

13 Q. As sailors in the Navy?

14 A. Yes. And so if you're talking about the actual
15 arms, we're talking about, what, ships' cannons; right? So
16 we're not talking about civilian firearms. We're talking --
17 we're talking "bear arms" in its general sense of to serve
18 in a military force.

19 Q. Of course.

20 A. Right? I mean, there's a difference between that
21 and an actual firearm.

22 Q. Right.

23 But on a narrower question, as you understand it,
24 a ship's cannon would use both the iron cannon itself and
25 the ammunition, the powder and ball that go into the cannon,

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1 yes?

2 MR. PEKELIS: Object to form.

3 BY MR. GALLAGHER:

4 Q. I can rephrase that.

5 Professor, what is your understanding of what it
6 takes to fire a ship's cannon?

7 A. Oh, you need a cannon. You need a cannonball.
8 You need someone to create the explosion.

9 Q. Okay.

10 A. I don't think that "bear arms" refers specifically
11 to the type of weaponry in this instance. I don't think
12 that -- they were going for dramatic effect here. They were
13 not going for accuracy and detail. This is a rhetorical
14 phrase.

15 Q. Let's turn to a few more examples from a related
16 exhibit, Exhibit 44, which is -- I think we have already
17 entered it, but it's the Bruen amicus brief.

18 A. 44. Oh, okay. Yeah.

19 Q. And I'll share my screen again this time too. I
20 keep forgetting to actually do that because I think it's
21 just permanently shared.

22 Let's go to page 15 of this.

23 A. Mm-hm.

24 Q. Do you want me to read the highlight?

25 Q. Let's start with the second highlight. The second

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1 highlight.

2 A. "All male persons, from sixteen years of age
3 to fifty, shall bear arms and duly attend all
4 musters and military exercise of the respective
5 troops and companies," dated 1760.

6 Q. And in this context, do you understand that the
7 male persons from 16 years of age to 50 were supposed to
8 bring anything to the musters?

9 A. The typical militia regulations called for
10 bringing your own weapon.

11 Q. Did they typically call for anything beyond the
12 weapon itself?

13 A. Sometimes they specified -- depends on the weapon,
14 okay? There are different weapons for different classes or
15 fighters in the militia, and "bear arms" is a general term
16 here to cover everything from the officers to the infantry
17 or the line soldier.

18 Q. So when it comes to the infantry line soldier,
19 what would you understand from this phrase that they were
20 supposed to bring to the musters?

21 A. It would depend on the particular requirements of
22 that particular militia.

23 Q. Do you have an opinion as to what generally would
24 be required?

25 A. Typically, some kind of firearm, long gun.

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1 Pistols were for the officers. Possibly specifying how many
2 bullets they were required to bring. How much gunpowder in
3 terms of weight sometimes is mentioned in the regs.
4 Sometimes the other accoutrement, like flints and other
5 implements, accessories to the firearm. But...

6 Q. So in a state that specified that infantry
7 soldiers were to bring ammunition and accoutrement and, in
8 the case of an infantry soldier, is it a fair reading to say
9 that this phrase, "all male persons shall bear arms and duly
10 attend all musters," would include bringing not only the
11 musket itself, but also the ammunition and accoutrement?

12 A. Probably.

13 Q. So at times, "arms" used on its own could imply
14 something more than the weapon itself, even if when
15 specified "arms," "ammunition," and "accoutrement" can refer
16 to distinct ideas; right?

17 A. Sometimes "bear arms" is used generally to just
18 indicate that you are being a soldier. I mean, one of the
19 early definitions of "bear arms," let's say in the Webster's
20 unabridged, was to serve as a soldier.

21 Q. But this passage, this 1760 passage we have been
22 discussing, it appears to be from a state militia law;
23 right?

24 A. It would appear to be, yes.

25 Q. And is it your understanding as to this specific

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1 passage that a state infantryman -- you know, assuming that
2 the state specified a given amount of accoutrement and
3 weapon -- and bullets that he was supposed to bring, would
4 be required to show up with all of that based on the phrase
5 "bear arms"?

6 MR. PEKELIS: Object to form.

7 THE WITNESS: Based on the fact they were in the
8 militia, they would be required to do it. But I would have
9 to see the full context.

10 BY MR. GALLAGHER:

11 Q. Let's bring up -- this is another sort of "may
12 use" exhibit, United States versus Miller. So I'll share
13 my...

14 A. Mm-hm.

15 THE COURT REPORTER: I'm not marking this,
16 Counsel?

17 MR. GALLAGHER: Let's mark this as Exhibit 46,
18 please.

19 We don't need to read, I think, all of this,
20 Professor.

21 THE COURT REPORTER: One moment.

22 I don't have Exhibit 46. Is this --

23 MR. PEKELIS: I don't either.

24 MR. GALLAGHER: Sorry. I was -- I thought I'd
25 said clearly enough that this isn't one that I had

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1 circulated. I didn't anticipate necessarily needing to use
2 it. It is -- I will circulate it afterwards, and it is --
3 it's just the plain text of the United States versus Miller.

4 MR. PEKELIS: Nick, if you could send it at least
5 to counsel now, that would be helpful.

6 MR. GALLAGHER: Sure.

7 MR. PEKELIS: And we have been going about another
8 hour. So maybe -- would this be a good time to take a break
9 so you can circulate your remaining exhibits to us?

10 MR. GALLAGHER: Yeah, let me do that. I -- I --
11 because of the problems that we ran into earlier -- well,
12 let's go off the record, and I'll just...

13 THE COURT REPORTER: We are off the record.

14 (Pause in the proceedings.)

15 BY MR. GALLAGHER:

16 Q. I had just offered Exhibit 46, United States
17 versus Miller. And, Professor, I'd asked you to look at the
18 highlighted sections of the militia laws that are discussed
19 from star 180 through star 182.

20 Have you had a chance to do so?

21 A. I'm looking at it now. That's on page 3; right?

22 Q. Yes. Yeah. Page 3 of this PDF, yeah.

23 A. Oh.

24 I see the stars. I didn't know what the stars
25 were.

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1 Q. It's a lawyer thing, and I couldn't remember the
2 initial US report number. So, yeah, page 3 of the PDF.

3 A. Okay.

4 What --

5 Q. So as to the laws here, at least as to infantrymen
6 who carried muskets, you would agree that they were all
7 required to show up not just with the musket, but with
8 ammunition and accoutrement as well; right?

9 A. Right.

10 Q. So returning to Exhibit -- where was it?
11 Exhibit 44, the Bruen amicus brief, our discussion of the
12 militia law in 1760. "All male persons shall bear arms and
13 duly attend all musters."

14 If you were an ordinary militiaman who was a
15 musketman and you were reading this law, would you
16 understand it to require you to turn up with just your
17 musket or also the ammunition and accoutrement that you were
18 required to bring as well?

19 A. The ammunition and accoutrement.

20 Q. And so at least in some circumstances, "arms" can
21 include ammunition and accoutrement; right?

22 A. It depends how you read "arms." If you read it in
23 the context of "bear arms," which means, as I read it, serve
24 as a soldier, then you are -- you are required to bring a
25 certain number of things. It doesn't mean all of those

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1 things are arms.

2 Q. Let me come at this a slightly different way.

3 You said earlier that the term "bear arms" can
4 vary technologically. In other words, in a society that
5 fought with -- or maybe I misunderstood you, but you said
6 that "bear arms" doesn't involve specific arms. It's a
7 phrase, but it doesn't necessarily entail just on its own
8 specific arms; right?

9 A. Not necessarily. That's right.

10 Q. So in a society that used swords and shields to
11 fight, you know, if we said that Aneas and his companions
12 were bearing arms, we would assume that they were not using
13 firearms but maybe swords or shields; right?

14 A. Yeah.

15 (Reporter clarification.)

16 MR. GALLAGHER: Aneas, A-N-E-A-S. Testing my
17 classical spelling today.

18 By MR. GALLAGHER:

19 Q. But by the same token, in a society that the
20 prevailing arms were firearms, we would assume that "bear
21 arms" referred to all of the usual firearms and things to
22 make them work; right?

23 THE COURT REPORTER: I saw your mouth move,
24 Mr. Pekelis, but you're muted.

25 Was there an objection?

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1 MR. PEKELIS: Thank you. Good catch.

2 Object to form.

3 I've been objecting throughout, all of these
4 questions, by the way.

5 THE COURT REPORTER: I have not heard --

6 MR. PEKELIS: I'm kidding. I'm kidding.

7 THE COURT REPORTER: Okay.

8 MR. PEKELIS: That was the only one.

9 THE COURT REPORTER: Thank you.

10 BY MR. GALLAGHER:

11 Q. Well, let's take a look at --

12 THE COURT REPORTER: I did not hear an answer if
13 there was one.

14 MR. GALLAGHER: Oh, yeah. Sorry.

15 THE WITNESS: I'm not sure I actually answered
16 that because -- say the question again. Say the question
17 again.

18 BY MR. GALLAGHER:

19 Q. So in the same way that if the society in question
20 used as arms swords and shields, we would assume that
21 "bearing arms" involved the use of swords and shields. If a
22 society used firearms, we would assume that the phrase "bear
23 arms" involved firearms and things that make them work;
24 right?

25 MR. PEKELIS: Object to form.

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1 THE WITNESS: I suppose. But --

2 BY MR. GALLAGHER:

3 Q. So let's take, for example, this non-highlighted
4 fourth-from-the-top on page 15 of Exhibit 44: "That numbers
5 of the inhabitants murmur at being obliged to bear arms; and
6 the dread of a French War is very general."

7 And this is from 1777.

8 Do you see that?

9 A. Yes.

10 Q. And in 1777, they generally used firearms to wage
11 wars; correct?

12 A. If you say so.

13 Q. Is there any reason to assume that the inhabitants
14 obliged to bear arms would only use muskets but not
15 ammunition in this passage?

16 A. My reading of the passage, and I assume that
17 "murmur" means object in some fashion, is not that the
18 numbers of inhabitants, as mentioned, object to the carrying
19 of weapons. They object to being drafted into the military.

20 Q. Right.

21 A. So I think that it's being used generally to say,
22 you know, I don't want to fight. Not my fight. I would
23 rather be tending to my crops or my shop or whatever. Being
24 obliged to bear arms means that they're being drafted,
25 basically. They're being -- they're being, as you used the

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1 term before, impressed into service, that they would rather
2 not do that. So that when you have the conscientious
3 objector clause that was in early drafts of the Second
4 Amendment --

5 Q. But if they were -- sorry. I thought you were
6 done.

7 A. -- where those -- I believe the phrase was
8 something like scrupulous of bearing arms or to be excused
9 from service in the militia, I mean, if you're talking about
10 the phrase that was put in to the early drafts of the Second
11 Amendment to excuse Quakers who were pacifists from serving
12 in the military. It's not that Quakers didn't use guns to
13 shoot game, it was that they didn't want to use arms to --
14 they didn't want to engage in any kind of warlike activity.
15 So I don't think "bear arms" here is referring specifically
16 to the equipment that the French peasants are supposed to
17 bring to their military service, but rather, their objection
18 in general to having to serve at all.

19 Q. Okay.

20 But in the next -- in the next example, then, the
21 one we have already discussed, it does actually somewhat
22 refer to the weapons they were supposed to bring to their
23 musters?

24 A. Yeah. That one is -- you know, covers both of
25 those meanings. One was bear arms as being in the militia

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1 to begin with. And then if you want to possibly drill down
2 to talk about what arms, we're getting away from bear arms,
3 which I still think is the idiomatic phrase rather referring
4 to -- rather than -- sorry. My earphones are whistling --
5 rather than referring to the specific weapon, which are
6 later in other parts of the regulation spelled out.

7 Q. Okay.

8 So let me give you a hypothetical, then, to maybe
9 disaggregate those two meanings that are born in the second
10 example.

11 A. Yeah.

12 Q. Supposing that, you know, a sergeant of militia in
13 1777 says to his men, you know, "Grab your arms and report
14 to the parade ground," do you think it's fair to assume that
15 he means ammunition as well as musket, assuming it's an
16 infantry company that uses muskets?

17 A. Right. And assuming that the drill includes live
18 ammo.

19 Q. Okay.

20 So to clarify -- even a better hypothetical,
21 suppose the drill sergeant in 1777 says to his infantrymen
22 who use muskets "Grab your arms. The enemy is attacking."
23 I would assume that it would be correct to interpret "arms"
24 as including ammunition in that phrase?

25 A. Probably, yeah.

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1 distinction between detachable magazines and fixed
2 magazines. Would you agree?

3 A. Yeah. Yeah.

4 Q. And in looking at cartridge boxes as an analog for
5 modern magazines, would you say cartridge boxes are more
6 analogous to detachable magazines or fixed magazines?

7 A. They would be detachable. They're something
8 soldiers wore on their belts, perhaps on a shoulder strap.
9 They were not part of the weapon itself.

10 Q. Understood.

11 Mr. Gallagher asked you about whether a ramrod
12 would be more analogous to a modern-day magazine than a
13 cartridge box. And I believe your testimony was that it
14 would not be; is that right?

15 A. In my opinion, it would not be because it doesn't
16 hold bullets.

17 Q. What does a ramrod do?

18 A. It -- you use it to push the bullet down the
19 barrel.

20 I presume, although, again, not a firearms expert,
21 that once breech-loading firearms were developed and became
22 more common, the ramrod was no longer necessary. This may
23 or may not be the case, but the ramrod didn't seem to be
24 analogous to a magazine.

25 Q. Based on your -- I realize you didn't -- well, let

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1 me ask it.

2 Did you look at the corpora for the word ramrod in
3 its use with the word arms?

4 A. No.

5 Q. Okay.

6 But based on your research in looking at the word
7 "arms" and the word "accoutrement," would a ramrod be
8 considered -- in the 18th-century and 19th-century lexicon,
9 would a ramrod be considered an arm or an accoutrement?

10 A. I believe it would be considered an accoutrement
11 or an accessory.

12 Q. Mr. Gallagher showed you several patents from the
13 1860s of very similar types of firearms that used the word
14 "magazine" in a way that appeared to refer to an internal
15 holder of ammunition.

16 Do you recall that?

17 A. Yes.

18 Q. Are patents parts of the corpora?

19 A. No.

20 Q. Why not?

21 A. I would have to guess because I'm not involved in
22 compiling the corpora. It may be -- patents may be on their
23 list to ultimately include them, but I did not come across
24 in my search any patent references. I don't know how well
25 they are digitized.

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1 A. The --

2 (Speaking simultaneously. Unreportable
3 crosstalk.)

4 (Reporter clarification.)

5 BY MR. GALLAGHER:

6 Q. In other words, what is the difference between a
7 firearms magazine and a box of bullets lying on the ground?

8 A. It sounds like an intro to a joke.

9 Q. Given that they are relevantly similar in that
10 both hold bullets, what is the difference between a magazine
11 and a box of --

12 A. Okay. Okay.

13 (Speaking simultaneously. Unreportable
14 crosstalk.)

15 (Reporter clarification.)

16 BY MR. GALLAGHER:

17 Q. I was saying: Given that they are relevantly
18 similar and that both hold bullets, what is the difference
19 between a modern magazine and a box that contains bullets?

20 A. The magazine, once it contains bullets, combines
21 the function of holding the bullets and feeding the bullets
22 into the firearm.

23 Q. Mr. Pekelis --

24 A. (Speaking simultaneously.)

25 Q. Sorry. Please finish. I thought you were done.

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1 ammunition, if such a device existed, would it be consistent
2 with your research that it be called an arm or an
3 accoutrement or both?

4 A. I'm leaning towards accoutrement, but if you could
5 describe in more detail what kind of mechanism you're
6 talking about...

7 Q. Well, it's hypothetical because as far as I know,
8 there wasn't such a device. But --

9 A. Right.

10 Q. -- if there were, would it be properly
11 characterized, based on your linguistic research, as an arm
12 or an accoutrement?

13 A. Okay.

14 I think I understand the question. I'm still
15 leaning towards accoutrement here.

16 MR. PEKELIS: Okay. I don't have anything else.

17 MR. GALLAGHER: I have two follow-ups on that.

18

19 FURTHER EXAMINATION

20 BY MR. GALLAGHER:

21 Q. So did I understand you correctly to answer that
22 in general, your opinion is that there is no analogy to a
23 mechanical feeding device in common use in the Founding
24 period?

25 A. Yes.

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1

C E R T I F I C A T E

2

3 STATE OF WASHINGTON

4 COUNTY OF PIERCE

5

6 I, Tia Reidt, a Certified Court Reporter in and
7 for the State of Washington, do hereby certify that the
8 foregoing transcript of the deposition of DENNIS E.
9 BARON, having been duly sworn, on March 30, 2023, is
10 true and accurate to the best of my knowledge, skill and
11 ability. Reading and signing was requested pursuant to
12 FRCP Rule 30(e).

13 IN WITNESS WHEREOF, I have hereunto set my hand
14 and seal this 4th day of April, 2023.

15

16

17

18

19

/S/ Tia B. Reidt
Tia B. Reidt, RPR, CCR # 22-0001
NOTARY PUBLIC, State of
Washington.
My commission expires
5/15/2026.

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